CENTRAL AFRICAN BUILDING CONSTRUCTION

versus

CONSTRUCTION RESOURCES AFRICA

(PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE

GOWORA J

HARARE 14, 17, 28 and 29 June, 1 and 26 July,

14 September 2010, 17, 18, 19 and 20 May 2011

and 14 March 2012

**Civil Trial**

*E Jori*, for the plaintiff

*L Uriri*, for the defendant

GOWORA J: The plaintiff has filed summons against the defendant seeking an order for a *rei vindicatio*. The summons did not have attached to it a declaration. The cause of action appeared in particulars of claim which were endorsed on the face of the summons. The particulars of claim on which the action was based were phrased as follows:

“The plaintiff’s claim is for an order evicting the defendant and all persons holding through it from three properties being 8 Whites Way, Msasa, 8 Loreley Close, Msasa and 8 Comet Close, Mt Pleasant, which properties belong to the plaintiff and are in the wrongful and unlawful possession of the defendant, plus costs of suit.”

In answer to the summons, the defendant had, on 15 February 2007 filed a bald plea in which it merely denied the allegation on the summons and put the plaintiff to the proof thereof. On 17 May 2007 however, the defendant filed an amended plea in which it repeated the denial of allegations. It then amplified its plea with additional averments as follows:

“The defendant further avers as follows:

1. That a Mr Viera who has purported to institute these proceedings has not been authorised by the plaintiff to bring the current proceedings.
2. That in any event no resolution has been passed by the plaintiff’s current directors to bring a claim against the defendant because the defendant is not in occupation of the premises in question.
3. That the premises in question are lawfully occupied by the current directors and shareholders of the plaintiff and that the plaintiff cannot seek its own eviction as there is no cause for such action.
4. That the current directors of the plaintiff have not breached the sale agreements between them and Mr Vieira concerning the premises in question upon which a vindicatory claim has been filed in this matter.
5. That all payments due to Mr Vieira were duly remitted and tendered.
6. That in the event that this court finds that Mr Vieira is still owed some money by the current directors and shareholders of the plaintiff, such amount is hereby tendered to Mr Vieira”.

The defendant then prays for a dismissal of the claim with costs. The plaintiff, through its legal practitioners protested to the defendant’s legal practitioners about the defective amendment to the plea but ultimately a replication was filed on behalf of the plaintiff. By the time the matter proceeded for a pre-trial conference it seems pretty evident that the parties had agreed to treat the amended plea as having been properly filed as no issue was raised at the pre-trial conference or thereafter.

The background to the claim by the plaintiff is the following:

 On 29 November 2004 the plaintiff in terms of a written agreement sold to the defendant assets listed on a schedule annexed to the agreement. An examination of the list shows that the assets comprised of office furniture, kitchen furniture and utensils, vehicles, workshop assets, generators, water pumps and radios and various other items to do with the plaintiff’s business operations. In evidence, the plaintiff’s witness described the items sold under this agreement as plant equipment and goodwill. The purchase price was recorded as US$219 000-00, (Two Hundred and Nineteen Thousand United States Dollars). The effective date of the agreement was 26 November 2004 and the purchase price was payable free of deductions against signature of the agreement by the parties.

Again on 29 November 2004 the parties concluded another written agreement this time in relation to three immovable properties registered in the name of the plaintiff; viz; Stand 272 Beverley East Township of Stand 261 Beverley East Township, Stand 195 Beverley East Township 3 of Stand 218 Beverley East Township and Stand 8 Comet Rise Township 2 of Comet Rise Estate A. The purchase price for the properties was recorded as US$296 000-00, US$97 000-00, and US$88 000-00 respectively. The effective date of this agreement was the date of signature which was 29 November 2004. This agreement just like the first had provision for payment of a portion of the purchase in Zimbabwe dollars converted from United States dollars at the auction rate as at the date of payment. Clause 7 of the agreement provides that transfer of the properties shall be effected within a reasonable period after the purchaser has fully paid the purchase price to the seller. All profit was in terms of clause 10 to vest in the purchaser with effect from the effective date from the purchaser was entitled to take occupation and be responsible for all rates, taxes, electricity, water, sewerage, refuse removal and other charges and surcharges lawfully rendered or levied in respect of the immovable properties.

On 7 November 2006 the plaintiff, through its legal practitioners of record, addressed a letter by registered mail to the defendant cancelling the agreement of sale relating to the sale of the immovable properties. On 9 January 2007 the plaintiff instituted these proceedings. It has therefore sought the eviction of the defendant from all three immovable premises on the grounds that it remains the registered owner of the same.

The plaintiff adduced evidence through Jose Eduardo Vieira who described himself as a shareholder and director of the plaintiff. It only called one witness. His evidence was to the following effect: He told the court that he was one of the directors of the plaintiff, the other being his father. At the time of the conclusion of the two agreements he was also a director and shareholder of the plaintiff. He stated that the plaintiff was seeking the cancellation of the agreement of sale relating to the three immovable properties and their return to the plaintiff.

 Regarding the circumstances of the sale, he said that in 2004 he and his father had decided to sell the assets of the company which comprised the plant and equipment and the goodwill as well as the three immovable properties. In about July 2004 he had a discussion with the defendant’s representative, D Musukuma regarding the sale of the above mentioned assets. The three immovable properties were according to him situate in Harare and were registered in the plaintiff’s name. In proof thereof he produced the original deeds reflecting the plaintiff as the registered owner for all three. He said that initially he and his father had proposed that all the assets be disposed of for a consideration of the equivalent of US $750 000-00, which was to be split in the ratio of sixty percent of the price to be paid in US dollars and the remaining forty percent in Zimbabwe dollars. After some haggling and negotiations between the parties he indicated that they were prepared to accept US $700 000-00 provided that sixty percent thereof would be paid in US dollars and the balance in local currency. According to the proposed manner of payment, the local component for payment in Zimbabwe dollars equivalent would be arrived at by converting the US dollars using the mid-rate between the auction bank rate and the parallel market rate on the date of the transaction. The plaintiff had proposed that upon the signing of the agreements by the parties the defendant had to pay a specified sum in the local currency as well as US dollars.

 The defendant did not accept the proposed conditions for payment and counter proposed a split of sixty percent in local currency and the balance in foreign currency. The defendant also refused to use the mid-rate in the conversion of the foreign currency into local currency. The defendant also undertook to make a payment of Z$1 000 000 000-00 upon signature of the agreements and payment of the outstanding balance within three months thereafter. The plaintiff was not entirely happy and suggested that the foreign currency ratio be forty five percent against a local component of fifty five percent. Thereafter the defendant sent a letter to the plaintiff in which it proposed a payment schedule of the US $700 000-00 and confirming that the rate of conversion would be the auction rate at the date of transaction. The defendant also proposed a payment plan over twelve months instead of four.

 Thereafter an agreement was drawn up in respect of the goodwill and assets of the business of the plaintiff with an asking price of US$219 000-00. His evidence was to the effect that the effective date of that agreement was 26 November 2004 and the entire purchase price should have been paid at the time of signing the agreement. He said that from that date the defendant could use the name “Central African Building and Construction” but would not acquire shares in the company until full payment would have been effected. The witness said that contrary to the agreement the defendant did not make any payment against the signature of the agreement. The agreement was signed on 29 November 2004, and in terms of the agreement a penalty interest of 7.5% would accrue daily on the outstanding sum with effect from the due date. He said that in terms of the agreement the delivery of assets would not been effective until payment of the full purchase price.

 In addition to the agreement described above the parties also concluded an agreement for the sale of immovable properties, which were registered in the name of the plaintiff. The properties, numbering three, were sold for a total price of US$481 000-00. It was a term of the agreement that transfer would only be effective once payment had been effected in full. The agreement contained an annexure detailing the manner of payment for the purchase price. The purchase price would be paid as to forty five percent in foreign currency and fifty-five percent in local currency. The value of the local currency component would be ascertained at the prevailing auction rate as at the date of the transaction. In the event that there was default in paying, the outstanding amount would be subject to an interest charge at the rate of 7.5% percent per annum from the date of default to the date of payment.

 He was asked to indicate how much had been paid as at the date of trial and he indicated that according to his calculations an amount of US $126 000-00 to US $129 731-00 had been paid. The actual amount paid was Zimbabwe dollars $1 805 000 000-00. which had been arrived at by applying the auction rate against the local currency that was paid to the plaintiff. He stated that the amount he had quoted as having been paid in US dollars had actually been paid in local currency. The defendant did not pay the foreign currency component of the purchase price.

 The witness set out that all necessary transfers for the shares and the title in the three immovable properties were to be effected once the defendant had paid in full under the two agreements. He stated further that he and his father were to resign after the defendant had fully complied with its obligations under the two agreements. He denied that he and his father had resigned as directors of the plaintiff or that they had transferred their shareholding to the Musukuma brothers. He agreed that the defendant made certain payments over the years but denied that such payment constituted full payment of the purchase as agreed between the parties or set out in the agreements. He said that on instructions from the plaintiff their legal practitioners had on several occasions written to the defendant and its legal practitioners advising them of the breach in paying the purchase price. There were also e-mails exchanged between the defendant’s representative D Musukuma and himself. The common thread throughout was a promise to pay in terms of the agreement. Payment was not made and as a result the plaintiff instructed its legal practitioners to cancel the agreements. A letter was therefore written on 7 November 2006. There was no response to it and instead the defendant through its legal practitioners sent a cheque of Z$2.5 million as settlement for the outstanding amounts. The tender was refused as the amount was considered wholly inadequate to settle the debt due. It was also refused on the basis that he had made payments in Zimbabwe dollars but had not paid anything in US dollars as provided for in the agreements. He did not believe that the agreement was unlawful. He denied that he had agreed to receive all the money due under the agreements in local currency. He said that after the agreements were signed he had no further discussions with the defendant.

 He was asked on the current ownership of the immovable properties and his answer was that he had not transferred title in them because the defendant had not paid the full purchase price. He denied that the defendant could be the lawful holder of title. He said that he had knowledge that the defendant had applied for copies of the title deeds from the Registrar of Deeds on the pretext that the originals had either been mislaid or lost. He said that it was clear that D Musukuma who deposed to the affidavit in support of the application had lied as he was aware at all times that the original deeds were being held by the plaintiff’s legal practitioners. He denied that he or his father had resigned as directors or made over their shareholding to the defendant. Consequently Danny and Lincewesi Musukuma were never appointed directors in their stead. The meeting at which this was supposed to have happened was not attended by him as he was not in the country. He also had doubts that his father had attended. He said that subsequent to the institution of these proceedings a meeting had been called for the shareholders of the plaintiff at which P C Paul of Wintertons had been appointed a director and it was at that meeting that the proceedings were ratified.

 He said that as sellers they had made certain undertakings which they had fulfilled. A letter was written to the police to facilitate the change in ownership on a number of vehicles sold to the defendant. Letters were also written to facilitate the transfer of telephone lines and the postal box to the names of the Musukumas to enable them to transact business under the agreement of sale. Those letters were however not meant to reflect a change in the ownership of the immovable properties or transfer of shares in the company.

In addition to the purchase price for the assets the defendant was also required to pay for rates and levies on the properties. The defendant again failed to pay these and in the letter of 7 November 2006 the plaintiff made demand for payment of these amounts.

The evidence from the defendant was deposed by Mr Danny Musuka. The evidence for the defendant was adduced through Danny Musukuma who described himself as a director of the defendant. He averred that he was one of the directors of the defendant, the other being Licewesi Musukuma his brother. He confirmed that the defendant had concluded two agreements with the plaintiff as reflected in annexures A7 and A8. He said that he had met Jose Fernando Vieira at a construction site sometime in the middle of 2004. Jose mentioned that he wanted to dispose of a company, meaning the plaintiff. Vieira had indicated that he had concluded an agreement with the Mumbembegwis which he was trying to cancel as they had failed to make payment under the agreement. Vieira promised to get back to him if he succeeded in cancelling the initial sale.

A month later Vieira told him he had cancelled the agreement with the Mumbembegwis and they commenced negotiations for the defendant to “purchase the company”. The negotiations went up to the end of October. The total price for the two agreements was settled at US$700 000-00. It was clear from the position adopted by J Vieira that initially he wanted payment to be effected partly in Zimbabwe dollars and in United States dollars, in the ratio of forty percent in Zimbabwe dollars and sixty percent in US dollars. Eventually the parties settled at forty-five percent in local currency and fifty-five percent in US dollars.

The payment under annexure 7 was to be made in local currency calculated at the Reserve Bank auction rate prevailing as at the effective date. He denied suggestions that Vieira could have under this agreement expected that payment would have been made in the US dollar instead of the local currency. The witness said that what was due to the Vieira under that agreement was US$219 000-00 which had to be converted to the local currency for payment. Although the witness seemed to suggest that the defendant had made payments of monies due under the agreements, he was constrained to concede that payment under the agreement of sale for the movables had not been effected in terms of the agreement. The suggestion made by him initially was that the Vieiras had not furnished him with the details pertaining to the mode of payment. It was evident however that soon after the agreements were signed he was given account details relating to Luis Vieira, and even thereafter he did not pay in full. He had suggested that Luis Vieira had told him that the payments had to be split equally between father and son. He said he could have paid for Luis Vieira’s share but was unable to pay for Jose Vieira because at some stage he was said to be in Mozambique where he could not be reached and thereafter suggestions were that he was in Australia. His evidence was to the effect that Luis had not cleared this mode of payment with his son and the defendant was therefore unable to pay until specific instructions were communicated to the defendant. he was however unable to explain why he had not paid Luis Vieira his complete half of the purchase price.

With regard to payment under the Deed of sale, the witness conceded that the defendant was, at the time that Messrs Wintertons wrote demanding payment in November 2006 in arrears. He conceded that the interest factor had not been taken into account. He said that the legal practitioners had not accepted the payment that was tendered through his legal practitioners. In his view even though the tender suggested that payment was in full and final payment of sums outstanding on the purchase price, the tender should have been accepted with demand being made for whatever was not included in the tender. In determining the dispute,

The witness did not stand up to cross–examination well. He said that the agreement on the properties did not capture everything that had been agreed upon between the sellers and the purchaser. He was asked if he had made an offer to the plaintiff to purchase plant and equipment and the plaintiff’s business. He said that although he could not confirm the date of his letter he recalled that the asking price from the plaintiff was an amount of US$800 000-00. He accepted that the plaintiff reduced the price to US$750 000-00 until it was agreed at US$700 000-00. He stated that the structure of payment proposed by Jose Vieira was that payment would be made in US dollars as well as Zimbabwe dollars. When questioned on the respective percentages for payment he became evasive and said he could not recall as there were a lot of negotiations and written communications between them. He was referred to a letter in which he had offered to pay US700 000-00, sixty percent would be payable in Zimbabwe dollars and the remaining forty percent in US dollars.

 I will dispose of the matter on the basis of the issues on which the matter was referred to trial which were as follows:

1. Has Mr Vieira transferred his shares and directorship to the defendants or its representatives?
2. Was the Agreement of Sale entered into between the plaintiff company and the defendant company properly cancelled?
3. Has the defendant tendered payment of the balance of the purchase price and other amounts owing in respect of the Agreement of Sale of immovable properties?
4. Is the defendant in occupation of the premise?
5. Is it open to the defendant to now make any tender?

In his closing address Mr *Jori* contended that the defendant had an onus to show that full payment had been made for the purchase price, that Luis Vieira and Jose Eduardo Vieira had transferred their shareholding in the plaintiff to the defendant, that the Vieiras had duly resigned and had in their stead appointed Danny and Linciwesi Musukuma as directors or that the CR 14 produced in respect of the company had been properly filed and constituted conclusive proof of its contents; that contrary to the plaintiff’s evidence ownership of the three immovable properties had been properly transferred in terms of the agreement of sale; that contrary to the plaintiff’s assertions the two properties that the defendant had disposed of were not *res litigiosa* and that the requirements of *rei vindicatio* had not been met.

WHETHER OR NOT THE VIEIRAS TRANSFERRED THEIR SHAREHOLDING TO THE DEFENDANT OR ITS REPRESENTATIVES

Subsequent to the parties having signed the two agreements, Jose Vieira wrote a letter to the defendant. In his evidence Danny Musukuma kept on making reference to an addendum to this agreement. In this regard he was referring to the letter referred to above which is dated 30 November 2004. The pertinent portion of the letter is in the following terms.

“Further to the signing of this agreement we wish to confirm the following:-

1. that on settlement of the full purchase price for the Deed of Sale and Agreement of Sale, we shall deliver to the purchaser all share certificates of the shares of company free from any pledge, cession or encumbrance, together with such transfer forms duly signed and stamped by or on behalf of the seller in such form of law as may be necessary to enable registration of the shares to be effected in the name of the purchaser (sic) in the books of the company.
2. that upon settlement of the full purchase price for the Deed of Sale and Agreement of Sale, we shall procure the registration of the directors, secretary, public officer and other officers of the Company.”

The letter in question does not alter the substance of the agreements of sale of the assets and the goodwill or the Deed of Sale on the immovable properties. It reiterates the position contained in the agreements and spells out the conditions under which the plaintiff would not only transfer ownership in the company and effect delivery of the company documents to the defendant, but it also seeks to emphasise that after full settlement of the purchase price the directors of the plaintiff would resign including the secretary, the public officer and other officers of the company.

The contention by the defendant is that the substance of the letter was that of an addendum which altered the provisions of the agreements and effectively allowed for the transfer of shares in the company from the Vieiras and the Musukuma brothers was effected.

It is also clear that soon after the agreements were signed, the directors of the defendant conducted themselves as directors of the plaintiff. It is therefore necessary to resolve from the outset whether in fact the directors of the plaintiff, in the guise of the Vieiras transferred their shareholding to the Musukuma as alleged by the latter and if they also resigned and appointed the Musukumas as directors to the plaintiff.

It is necessary therefore to examine the relevant clauses of the agreements dealing with the effect of the disposal of the assets of the plaintiff to determine the intention of the parties to the agreement as it relates to the passing of ownership in the company. The agreement of sale, which deals with sale of the movables and the goodwill contains three clauses which are pertinent to the discussion. They are couched as follows:

“4. The Purchaser shall pay the purchase price to the seller free of deductions, against signature of this agreement.

5. In the event of any default in payment of any portion of the purchase price, interest shall accrue with effect from the due date of payment on the outstanding balance of the purchase price from time to time at the rate of 7 1/2% (seven and one half percent per annum) calculated on a daily basis.

7. It is recorded that delivery of the assets hereby sold shall be effected only against payment of the full purchase price.

10. All profit in the assets, the stock and the goodwill shall pass from the seller to the purchaser on the effective date.

12. That the seller authorises and empowers the purchaser to use the trading name “Central African Building and Construction (CABCO)” on its letter heads, advertisements, tenders and or official communications. The purchaser shall have no entitlement however to advertise or hold out to third parties that it has acquired the shares in the seller. In the event that the purchaser breaches this clause in any way whatsoever, the seller reserves to itself the right to withdraw the consent set out in this paragraph.

16. This agreement represents the entire contract between the parties. No purported amendment or waiver or addition to any provision thereof or notice given and no collateral or replacement agreement in relation to the subject matter thereof shall be of any force or effect unless and until reduced to writing in a document signed by the parties, each before (2) two witnesses”

In terms of clause 4 the purchase price was payable upon signature of the agreement. It is common cause that no payment was effected and that the first payment was made into the account held by Luis Vieira and constituted an amount of Z$100 million and yet the total amount due and owing was in excess of US$219 000-00. Further to this, delivery of the assets in accordance with clause 7 could only be effected upon full payment of the purchase price. Before then all the defendant had was entitlement to the profit. In terms of clause 12 the defendant had no right to hold out that it had acquired the shares in the company from the use of the company name and goodwill. This clause is to be read in conjunction with clause 10 which provides for the passing of risk in the assets to the defendant upon the full settlement of the purchase price.

In the circumstances I do not see how the defendant could even allege that the letter sought to alter the provisions of the agreement of sale. In any event, in terms of clause 16 of the agreement, no alteration, variation or amendment of any provision would be of any force unless reduced to writing and signed by both parties and duly witnessed by two signatories. The document that the defendant refers to as an addendum is a letter written by one of the parties, it is not witnessed and the other party to the agreement has not signed. In my view therefore the provisions of the agreement were not altered or varied.

Further to that if regard is had to the letter written by Jose Eduardo Vieira on 30 November 2004 it is even more improbable that the two would have resigned and handed over shareholding in the company in the absence of payment for the assets by the defendant. In any event, the agreement of sale is clear. It does not purport to dispose of the shareholding in the company and the position is clearly set out in clause 12 of the said agreement. The letter written to the defendant on 30 November 2004 in my view constitutes a statement of intent on the part of the shareholders, that they may consider transferring the shareholding of the company to the defendant if the assets are fully paid for in which event they would simultaneously resign as directors. The defendant did not pay for the assets in full within the time frame provided in the agreements.

Musukuma said that upon signing the agreements on 29 November 2004 he took control of the company through a handover and take-over which was done that day and concluded the following day when Vieira brought the addendum. He then tendered payment for the agreement of sale and Vieira told him that he had to discuss with his father and provide account details into which the payments would be made. His evidence was to the effect that Jose Vieira had also said that he would want payments to be evenly split between his father and himself. Two days later Musukuma had tried to contact Vieira on his mobile phone but he was not reachable. According to the witness attempts to reach J Vieira were fruitless. The father had promised to let his son know that Musukuma was trying to reach him. On 9 December 2004 Louis Vieira phoned him and asked him for a payment of Z$100 million which he paid. On 22 December Luis Vieira requested an amount of Z$50 million which he paid. Subsequent to that Luis Vieira provided him with an account at Standard Chartered Bank into which he requested payments relating to his fifty percent to be made. He also produced a document in which Luis Vieira acknowledged having received an amount of Z$1 930 000 000-00. On 4 January 2006 the witness had caused the transfer of Z$600 000-00 into the account nominated by L Vieira for the payment of sums due to him. According to the witness, as at 3 January 2006 the defendant had paid Z$2 530 000 000-00 leaving a balance owing in the sum of Z$1 480 578 118-00.

Subsequent to this, the witness stated that the defendant had tendered payment of an amount of Z$500 000 000-00 through a cheque sent to Wintertons and the cheque was returned. The witness acknowledged in court that the amount was insufficient to cover the total outstanding then, but that this was an interim payment as the amount outstanding then was Z$1 480 578 118-00. After this through the defendant’s legal practitioners a cheque in the sum of Z$2.5 million was tendered as payment for any outstanding sums but the cheque was returned. He said that he was surprised at the attitude of the plaintiff because as at 3 January 2006 he and his company had fully liquidated its obligations in terms of Annexure 8 which is the Deed of Sale.

It is clear even from the evidence of the defendant that payment in respect of the two agreements was not effected as and when the agreements provided. In his evidence in chief, Musukuma went to great lengths to describe how he and Jose had ended up negotiating for the sale of the company. He told this court that Vieira was in the process of cancelling an earlier agreement over the sale of the same company due to non-payment. It would, as a result be stretching the bounds of credulity that after such an experience the Vieiras would give the Musukuma brothers *carte blanche* over the company and all its assets before payment had been effected. It was also evident that the witness was departing from earlier suggestions that there had been a meeting wherein he and his brother had been appointed as directors. That much was evident from the line of questioning adopted by his counsel when the plaintiff’s witness was being cross-examined. Yet, the defendant suggests that even before it had paid a single dime under either agreement, the Vieiras had resigned as directors to the company and handed over all the reigns of the said company. The improbabilities of such a scenario are enormous.

THE FORM CR 14

It seems to me that the issue of authority to institute the proceedings on the part of the Vieiras is interlinked with the issue of who the directors and shareholders of the company were. In other words, the question to be answered is whether the Vieiras appointed the Musukumas as directors of the company in their stead. This question then puts in issue the CR 14 which was filed at the Company registry office as well as the minutes of the meeting where the appointments were alleged to have been made.

The evidence from the plaintiff was that Vieira Junior was not in the country on the date the meeting is supposed to have taken place. The plaintiff has put the validity of the two documents in issue and it is for the defendant to establish that indeed the meeting did take place and that the Musukumas were appointed directors in which event the Vieiras authority to institute proceedings on behalf of the plaintiff would not exist. The contention by the defendant is that there should be a valid resolution passed by a board of directors of the company at a properly constituted meeting in which the proceedings were authorised. Whether or not there was a meeting is a question of fact which should be established by evidence. The contention by the defendant is that once a director has been appointed the appointment must be notified to the registrar of companies in the form of a CR 14 and that once this form has been filed there is a presumption of regularity.

In the cross examination of plaintiff’s witness reliance was placed on a CR 14 filed by Somerset Services who were appointed by the defendant as secretaries to the plaintiff. The document was allegedly extracted from minutes of a meeting held on 3 January 2005. He said that the CR 14 was filed in the Companies Registry on 24 January 2006. He suggested that before the CR 14 form was filed Mr Louis Vieira and his son Jose Eduardo had resigned on 1 January 2005. He and his brother had simultaneously with their resignation been appointed as directors to the plaintiff. He referred to a resolution apparently signed by Mr Luis Vieira and confirmed that it had been signed by him. At the time Mr Vieira was the chairman of the board. He confirmed that on 25 January 2005 Mr L Vieira had written a letter in which he stated that he, D Musukuma would take charge of the company as principal officer with effect from the date of the letter. He said he understood the letter to mean that he was ultimately responsible for all the decisions and operations of the company. He stated that the letter from the legal practitioners of the Vieiras calling for an extraordinary meeting of the plaintiff had been sent to him at the company’s premises. He referred to the Vieiras as the former shareholders of the plaintiff.

Turning to the CR 14 it was his evidence that this was lodged on 24 January 2006 by the defendant’s secretaries. It was his further evidence that it was prepared by Louis Vieira. He said that Louis Vieira had requested the details for the directors of the defendant so that the form CR 14 could be lodged. The witness denied that the defendant was in occupation of the plaintiff’s premises. He said he and his brother were in occupation of the premises in their capacities as directors, shareholders and owners of the plaintiff.

In his evidence Musukuma conceded that there was in fact no meeting which took place on 3 January 2005. Also from his evidence he had not been able to get hold of Jose Eduardo Vieira to effect payment of his share of the purchase price of the sale of the assets. According to the evidence of this witness he was only in touch with Jose Vieira in July 2005 when the latter contacted him from Australia with an account number to which his portion of the purchase price could be deposited. The only inference to be drawn from this evidence is therefore that Jose Vieira could not have resigned either in December 2004 or early January as he was out of touch. Since the purported meeting never took place it was up to the defendant to establish how the two Vieiras resigned and appointed them as directors. That evidence has not been placed before the court. In the absence of evidence confirming that a meeting took place, that the Vieiras formally tendered their resignations as directors and appointed the Musukuma brothers I am unable to accept the contention that the plaintiff has had a change in the persons supposed to act as directors on its behalf.

 Mr *Uriri* contended that returns filed in the companies registry are *prima facie* proof of the correctness of the contents thereof and that such returns can only be set aside by the Registrar if he has reason to believe that they contain false information.

Section 12 of the Companies Act [*Cap 24:03*] on which the defendant relies provides as follows in the pertinent parts:

“Any person having dealings with a company or with someone deriving title from a company shall be entitled to make the following presumptions, and the company and anyone deriving title from it shall be stopped from denying its truth-

a) …n/a

b) that every person described in the company’s register of directors and secretaries, or in any return delivered to the Registrar by the company in terms of section one hundred and eighty-seven, as a director, manager or secretary of the company has been duly appointed and has authority to exercise the functions customarily exercised by a director, manager or secretary as the case may be, of a company carrying on the business of the kind being carried on by the company;

1. ... n/a
2. … n/a
3. …n/a

Provided that-

1. a person shall not be entitled to make such assumptions if he has actual knowledge to the contrary or if he ought reasonably to know the contrary;
2. n/a”.

Mr *Jori* submits that the section deals with a situation where the company itself has lodged the CR14 and if it does so, then certain presumptions are made and the company is estopped from denying to third parties the contents of the document. The plaintiff has denied that the document was properly produced and alleges fraud on the part of the defendant and its directors relating to its signature by Mr Vieira senior and its lodgement with the Registrar of Companies. It is however safe to assume that the presumption provided for in the section would operate against the company in favour of any third parties doing business with the company. It would not be logical to interpret the section to provide for a presumption against its directors and shareholders where documents that have been lodged are disputed by the parties who are supposed to lodge the documents themselves. In any event, in terms of the proviso to the section, the presumption is not available to a person who has knowledge to the contrary or is supposed to have such knowledge. I am not convinced that the defendant is entitled to hide behind the presumption of regularity without an explanation from its directors as to the manner in which the document was lodged with the companies’ registry as an extract of minutes from a meeting which was never held. The explanation proffered by the defendant after the manner in which the plaintiff’s witness was cross examined is not acceptable. I have to find that there was no meeting in which case the form CR 14 has no authenticity.

It remains therefore that the court will have to enquire into the validity of the returns as that is the mast upon which the defendant has nailed its defence to the claim launched by the plaintiff. In *Henochsberg* on the Companies Act at p 261 the statement is made that the annual return is admissible in evidence as *prima facie* proof of the truth of its contents since the company has the statutory duty to make the return and the Registrar is under a duty to preserve it and make it available for inspection by the public. See *R* v *Halpin* (1975) QB 907. There is no provision in the Act which states that the returns can only be set aside by the Registrar as suggested by Mr *Uriri* and he has not pointed the court to any section of the Act in support of that proposition. Since it is an artificial persona a company can only act through its directors, sometimes called the human agency. In this case the evidence suggests that those directors are the Vieiras. If any credence is to be placed upon the CR14 which was filed with the companies registry that would also include the Musukuma brothers. However, given the evidence of the plaintiff’s witness that they were not appointed as directors and it is therefore incumbent upon the defendant to place before the court evidence that would confirm that they were indeed appointed as directors.

Mr *Uriri* seems to suggest that in the absence of a resolution from the board of directors of the plaintiff authorizing the institution of these proceedings I must find that the Vieiras were not duly authorized and accordingly dismiss the claim on that basis. He has placed his reliance on remarks I made in *Siziba* v *Dankwerts & Anor* HH 108-08 to the effect that in the absence of a resolution the plaintiff therein had failed to establish that he had the requisite authority to institute proceedings on behalf of Hawkhope Investments (Pvt) Ltd which had been cited as the second plaintiff.

In my view the correct legal position has been aptly summarized by Mr *Jori*. Mr Vieira and his father were directors of the company for some point in time in existence of the company. A document from the Registrar of Companies has been produced which is seriously challenged by the plaintiff which denies that the defendant’s representatives were ever appointed as directors for the plaintiff. In the premises, it is my view that the authority cited by the defendant can be distinguished from the present case. In any event my remarks in *Siziba* were premised on the basis of dicta in *Mall* (*Cape*) (*Pty*) *Ltd* v *Merino Ko-operasieBpk* 1957 (2) SA 347 (CPD), a judgment by WATERMEYER J. The learned judge of appeal appeared in that case to have placed a burden on both sides, first of all, on the one party to adduce evidence of authority to institute proceedings; and to the challenge evidence to suggest lack of authority on the other. The remarks by the learned judge were to the following effect:

“There is a considerable amount of authority for the proposition that, where a company commences proceedings by way of petition, it must appear that the person who makes the petition on behalf of the company is duly authorized by the company to do so (See for example *Lurie Brothers Ltd* v *Arcache*, 1927 NPD 139, and other cases mentioned in Herbstein and van Winsen, *Civil Practice of the Superior Courts in South Africa* at pp 37, 38). This seems to me to be a salutary rule and one which should apply also to notice of motion proceedings where the applicant is an artificial person. In such cases some evidence should be placed before the court to show that the applicant has duly resolved to institute proceedings and that the proceedings are instituted at its instance. Unlike the case of an individual, the mere signature of the notice of motion by an attorney and the fact that the proceedings purport to be brought in the name of the applicant are in my view insufficient. The best evidence that the proceedings have been properly authorized would be provided by an affidavit made by an official of the company annexing a copy of the resolution but I do not consider that that form of proof is necessary in every case. Each case must be considered on its own merits and the court must decide whether enough has been placed before it to warrant the conclusion that that it is the applicant which is litigating and not some unauthorized person on its behalf. Where, as in the present case, the respondent has offered no evidence at all to suggest that the applicant is not properly before the court, then I consider that a minimum of evidence will be required from the applicant. (cf *Parsons* v *Barkly East Municipality; supra; Thelma Court Flats* (*Pty*) *Ltd* v *McSwigin* 1954 (3) SA 457 (C)”.

In order for the defendant to successfully argue that the institution of proceedings on behalf of the plaintiff has not been authorized by the company it is necessary, according to the authorities, that the defendant place before the court a minimum of evidence suggesting that there is no such authority. I am mindful of the fact that most of the authorities that have been cited which deal with this particular point emanate from matters brought before the court, either as petitions or on notice of motion in which event the parties thereto would have filed affidavits in which evidence is given by either side as to the lack of authority or to its existence.

The CR 14 which should be the best evidence on this position is hotly disputed as the circumstances under which it was filed remain clouded in mystery. The defendant seems to place reliance on it and it was therefore incumbent that the defendant adduces evidence and explain to the court how and when the document was originated and filed with the Registrar of Companies. This evidence is particularly necessary where the parties are in conflict as to whether or not ownership in the company has passed which would lead to a change in directors as a result of the change in shareholding. In my view the plaintiff filed the CR 14 as a response from the allegation by the defendant that the premises in respect of which the plaintiff seeks the eviction of the defendants are now occupied by the plaintiff’s current directors and shareholders. There has been no evidence tendered that would point to the shareholding having changed hands. It is trite that directors to a company are appointed by the shareholders. If the shareholding is still held by the Vieiras then it would be difficult for me to find that the CR 14 reflects the correct position as far as the persons responsible for running the affairs of the company are concerned. There are allegations that the CR 14 was filed fraudulently and the papers that have been placed before me coupled with the evidence of Mr Vieira Junior leads to conclude that the defendant has failed to discharge the *onus* that lay upon it over the circumstances under which the CR 14 came into existence and how it came to be filed when all the correspondence between the parties point to an inability or failure on the part of the defendant to pay the amount agreed as the purchase price for not just the plant and equipment, but the immovable properties as well.

In any event, as argued by the plaintiff even if the institution of the proceedings had not been authorized, they can be ratified. See *Smith* v *Kwanonqubela Town Council* 1999 (4) SA 947 at 952 F-G, wherein the court quoted with approval the judgment in *Uitenhage Municipality* v *Uys* 1974 (3) SA 800 (E) at 806H-807H. The question as to whether or the Vieiras had the authority to institute proceedings on behalf of the plaintiff can only be resolved in my view with a determination of the issue of who the directors of the company are. The contested CR 14 has not resolved that the dispute as it is seriously challenged by Mr Vieira and it would in my view be inequitable to for this court to place reliance on a document the authentic of which has not been confirmed from evidence adduced by a party seeking to rely on it. Since it was the defendant that placed reliance on the document as a ground for challenging the legality of this *lis*, it was incumbent upon the defendant to adduce evidence to establish that the CR 14 was legitimate. The defendant has failed to discharge the *onus* in connection with the lack of authority for the *lis* and in the premises it is my finding that the *lis* instituted on behalf of the plaintiff on the instructions of Jose and Luis Vieira was properly authorised.

WAS THE AGREEMENT PROPERLY CANCELLED?

It seems that the parties are in agreement that the defendant has paid the Zimbabwe dollar equivalent of the purchase price for the assets, plant and equipment and the goodwill. The dispute is centred on the payment of the purchase price for the immovable properties in terms of the Deed of Sale. The purchase price and manner of payment under the Deed of Sale are provided for in Clauses 4 and 5 of the agreement. The clauses are to this effect:

“4. That the purchaser shall pay to the seller the amount of US481 000-00 (Four Hundred and Eighty One Thousand United States Dollars) for the property (hereinafter referred to as the “Purchase Price”). That, for purposes of conversion into Zimbabwe Dollars, if any, the rate shall be calculated at the auction rate prevailing in terms of the Zimbabwe Reserve Bank Auction Scheme as at the date of payment.

5. The Purchaser shall pay the Purchase Price, free of interest, to the Seller in Harare, free of bank commission and any bank special clearance charges or other charges as set out in Annexure “A” hereto.”

It must be said that due to the manner in which the parties had structured the two agreements and the mode of payment relating to the calculation of any monies due under either agreement, it would be fair to say that witnesses for both parties struggled to state the precise sum due at any given time. It is also fair to say that when calculating in court the amounts that could have been due, Mr *Jori* had recourse to a schedule from the Reserve Bank of Zimbabwe which indicated the auction rates at various stages from November 2004 when the agreement was signed initially to November 2006. It is fair to state that based on the figures reflected in the schedule and applied to the base sum in United States dollars, the defendant cannot be said to have paid the full purchase price agreed by the parties.

 The plaintiff produced the original title deeds for the three immovable properties which reflected that the properties were registered in the name of the plaintiff. In terms of the Deed of Sale concluded on 29 November 2004 transfer of the properties into the name of the defendant would in terms of clause 7 of the same be effected by the seller’s conveyancers within a reasonable period after the purchaser has fully paid the purchase price to the seller. Yet on 9 March 2009 the defendant’s legal practitioners addressed a letter to the plaintiff’s legal practitioners in which the following is stated:

“Be that as it may, it has also come to our attention through your aforesaid letter and pleadings in Case 708/09 that unbeknown to our Mr Chinawa;

1. our clients have sold some of the properties in question to third parties ;

…

…

As indicated above, our Mr Chinawa only came to know of the alleged fraudulent transfers of the two properties through your letter. The transfers were not handled by us nor was our advice sought.

The writer has also ascertained that some time last year, Mr Masukuma approached our conveyancing department with instructions for application for lost Deeds. The department proceeded to take all the necessary steps in law recovery of the Deeds as requested by Mr Musukuma.”

The letter from the defendant’s legal practitioners was clearly contrary to what was agreed to by the parties in the agreements of sale in respect of the plant and equipment and the sale of the immovable properties themselves. The day after the two agreements were signed the plaintiff addressed a letter to the defendant for the attention of Mr Musukuma on the implementation of the agreements in which it reiterated its position regarding the transfer of title in the immovable properties, resignation of the directors and transfer of shares in the company. All these were contingent upon the purchaser having made full settlement of its obligations under the two agreements.

The plaintiff has produced letters from its legal practitioners and addressed to the defendant and its legal practitioners, wherein the plaintiff complains that the defendant had not paid the purchase price in terms of the schedules agreed between the parties and which schedules formed part of the agreement. The plaintiff has also produced letters written on behalf of the defendant regarding the issue of payment of the purchase price. On 5 October 2006 the defendant’s legal practitioners addressed a ‘without prejudice’ letter to the plaintiff’s legal practitioners giving an undertaking by their client to undertake a comprehensive calculation and account on all payments done to date, including any arrears if any, by 25 October 2006. On the 25th the same legal practitioners addressed a letter to the plaintiff’s legal practitioners in which a schedule of payments allegedly made to the plaintiff was attached.

The schedule in question, which the plaintiff produced to court, showed that as at 3 January 2006 the defendant owed an amount of Z$1 480 578 118-00. The figures appearing on the schedule had been generated by the defendant and sent to the plaintiff’s legal practitioners under cover of a letter from the defendant’s legal practitioners, dated 25 October 2006. It is worthy to note that despite an indication therein that their client owed such vast sums of money no offer of settlement is made in that letter which is contrary to an undertaking made in the letter of 5 October 2006 made by the same legal practitioners that the defendant would settle its indebtedness if any by 25 October 2006. Yet on 25 October 2006 all that the defendant did was to state what it considered owing as at 3 January 2006. On 27 October 2006 the plaintiff’s legal practitioners dispatched a letter to their counterparts denying that the amount being claimed as having been paid and repeating an earlier version to the effect that the amounts paid amounted to Z$1 805 000 000-00. The defendant was put on terms to provide proof of any amounts paid in excess of the sum indicated. That letter was not responded to. On 7 November 2006 the plaintiff’s legal practitioners then sent a notice to the defendant by registered mail calling upon it to rectify the breach of the agreement within thirty days failing which the agreement would be considered cancelled. On 6 December 2006 the defendant’s legal practitioners sent a cheque of Z$2 500 000-00 to the plaintiff’s legal practitioners under cover of a letter. The letter states that the amount was in full and final settlement of the amount outstanding by the defendant. There is no reference made to the letter of cancellation sent a month earlier to the defendant. The tender was rejected and the cheque returned.

It is not in dispute that at the time the notice was written to the defendant it was in default of its payments. The tender of 6 December 2006 is testimony to the fact that the defendant acknowledged that as at that time the plaintiff had not been paid in full. It is not clear under which of the two agreements the tender was being made. It is also interesting to note that the letter from the plaintiff’s legal practitioners calling upon the defendant to furnish proof of payment of any other sums in addition to a sum of Z$1 805 000 000-00 went unanswered. The defendant’s contention is that it has paid the sums owing under the purchase agreements and the *onus* was upon it throughout to provide proof of payment in full of the purchase price. The defendant has not discharged that *onus*.

There is no dispute that the notice referred to above was received by the defendant. The contention is that it did not constitute proper notice on a number of grounds. The Deed of Sale was an instalment sale which is subject to the provisions of the Contractual Penalties Act [*Cap 8*:*04*]. The defendant contends that in the notice the plaintiff never stated the exact amount that was due. The defendant further contends that it is trite that in order for the notice to be valid, the exact nature of the breach must be stated. Counsel did not provide any authority for this principle. Section 8 of the Act upon which counsel’s argument is centred reads:

“1. No seller under an instalment sale of land may, on account of any breach of contract by the purchaser-

a) Enforce a penalty stipulation or a provision for the accelerated payment of the purchase price ; or

b) Terminate the contract; or

c) Institute any proceedings for damages;-

Unless he has given notice in terms of subs (2) and the period of the notice has expired without the breach being remedied, rectified or discontinued as the case may be.

2) Notice in terms of subs (1) shall-

1. Be given in writing to the purchaser; and
2. Advise the purchaser of the breach concerned; and
3. Call upon the purchaser to remedy, rectify or desist from continuing, as the case may be, the breach concerned within a reasonable period specified in the notice which period shall not be less than-
4. The period fixed for the purchase in the instalment sale of the land concerned; or
5. Thirty days;

Whichever is the longer period.”

I find myself in agreement with Mr *Jori* when he suggests that despite the contention by counsel that it is trite that the notice must give the exact nature of the breach, that the proposition proffered by counsel **is** neither the law nor is it trite. It is a canon of the law of interpretation that words and phrases in a statute must be given their ordinary grammatical meaning unless to do so would lead to an absurdity. I have not been referred to any authority in which the clause that the defendant has referred to has been interpreted in terms of the exact requirements placed upon the seller on the detail of what the notice must contain on the breach in order to inform the purchaser of his default and the steps that are required to be taken for the default to be rectified. The word ‘exact’ relied on is not mentioned in the clause of the section of the Act under discussion and in my view it would seem as though it has been read into the context by the defendant.

A lex commissoria is a stipulation in a contract of sale which provides that unless the purchase price is paid within a certain time rendering the contract voidable at the option of the vendor. Where a lex commissoria is inserted, the seller or purchaser, as the case may be depending on the party in whose favour it has been inserted, is entitled to cancel the contract if the conditions under which the lex commissoria comes into operation are strictly fulfilled. The question of whether the conditions have been strictly fulfilled is a question of interpretation. There are authorities within the South African jurisdiction in which the validity of a notice given under a *lex commissoria* has been considered. In *Chatrooghoon* v *Desai & Ors* 1951 (4) SA 122 BROOME JP in considering the validity of a notice sent to lessee under a contract of lease stated:

“I proceed to consider the notice in the present case, in the light of this passage. First, what are the conditions which clause 18 requires to be fulfilled? The lessors must call upon the lessee by written notice to pay the arrear rent. Those being the conditions, the second question is whether the notice fulfils them. Manifestly the notice calls upon the lessee to pay arrear rent. How then can it be said the notice does not fulfil the conditions? Mr *Milne*’s contention is that the words ‘per return post’ vitiates it. But how? They do not qualify the demand; rather they make it more peremptory. It must be remembered that the notice requires payment of an amount overdue. It reminds the lessee that it is overdue and it calls upon him to make by return post a payment which should have been made some time before.”

The court held that the notice, despite containing the words ‘please’ and by ‘return post’, was good and found it valid. There was no attempt in the submissions made before me to justify the word ‘exact’ into being read into the context and in the absence of such justification on the part of the defendant I am unable to conclude that the notice fails for want of detail as to the exact sum due and owing by the defendant.

In addition to this, the manner in which the parties structured their agreement was that the Zimbabwe dollar component would be calculated based on the prevailing auction rate as at the date of transaction or payment. From a practical point of view therefore the only sum that could have been worked out with any exactitude would be the US dollar component. As the defendant seemed keen on paying the plaintiff in the local currency it seems to me that even if the plaintiff had given this figure to the defendant at the outset, the local component could only be determined on the date of payment in view of the need to have recourse to the prevailing auction rate of exchange as at the date of transacting. The defendant knew it was in default of its obligations. It had sent a schedule to the plaintiff justifying having paid more than the plaintiff acknowledged receiving. It ignored calls for it to justify the payments it claimed it had made. The breach by the defendant in fulfilling its obligations under the two agreements is not in dispute. The defendant has not argued that such was not sufficient to justify cancellation. It is argued instead that the notice preceding the cancellation was invalid.

The purpose of a notice is to inform a purchaser of what he is required to do in order to avoid the consequences of default, and if it is in such terms as to leave him in doubt as to the details of what is required of him, then it may be that it will be held that the notice is not one such as is contemplated by the contract.[[1]](#footnote-1) Irrespective of the facts there are certain general conditions which are essential for the application of the term in the contract. A time must be fixed within which the obligation must be performed. If no time is fixed then the obligation must be performed within a reasonable time, in which event the seller must place the purchaser in *mora*. See Provident Land Trust v Union Government 1911 A.D. 615. The whole of that time must have elapsed. The conditions of the *lex commissoria* will not be fulfilled if the notice is premature. See *Truter* v *Smith* 1971 (1) S.A. 453 The obligation of the purchase after the notice must remain substantially unperformed on or after the due date of the notice.

The defendant, apart from challenging the validity of the notice on the grounds that it did not give the exact sum to be paid by it, has not placed before this court any cogent reason attacking the validity of such notice. In the premises I am inclined to accept the contention by the plaintiff that the proposition being advanced by the defendant is not based on any legal principle. I find no invalidity in the notice of cancellation. It follows therefore that the agreement was properly cancelled.

HAS THE DEFENDANT TENDERED PAYMENT OF THE BALANCE OUTSTANDING IN RESPECT OF THE AGREEMENT OF SALE ON THE IMMOVABLE PROPERTIES

In his evidence the witness for the defendant suggested that the purchase price to paid for the immovable properties is what is set out in Annexure A to the Deed of Sale agreement. That is correct in so far as the amounts reflected in the first column representing the US dollar component. In my view, the annexure to the agreement does not alter or vary the specific provisions of the clauses requiring that payment of the purchase price was to be in US dollars. The local component, where it is relevant, is arrived at by applying the auction rate prevailing at the time that the payment in Zimbabwe is effected. The defendant sought to place an interpretation of the clause which would have the effect of rendering payment in Zimbabwe dollars as the only mode of payment. Clearly that is not what the agreement provided for. I have to accept the position of the plaintiff that the parties agreed that forty-five percent of the purchase price was payable in US dollars and the remaining fifty-five percent in local currency. Indeed the annexure on which the defendant places reliance on speaks to this. Annexure ‘A” to the Deed of Sale is comprised of columns providing for an amount in US currency, an amount in Zimbabwe dollars and a total in Zimbabwe dollars which should have been paid monthly from 31 January 2005 to 31 December 2005. The amount reflected in US currency is exactly 45.41% of the total monthly sum of Zimbabwe dollars $228 220 733-00. The amount reflected in Zimbabwe dollars as $124 583 333-00 is equal to 54.5 % of Z$228 220 733-00. In my view therefore Annexure “A” seeks to reduce to figures the amounts payable by the defendant towards the purchase price under the deed of sale agreement.

Whilst it appears that the Zimbabwe dollar component had been fixed at Z$124 583 333-00 every month, this must be read in the context of an agreement where a fixed sum in US dollars had to be calculated at the time of payment and as stated by the plaintiff’s witness the sum reflected as the local payment in the annexure was merely an indicative measure to assist the defendant because none of the parties could foresee what the auction rate would be on the date of payment. According to the agreement the payment was going to be spread over eleven months and to the parties an estimate of the sum that could be paid in local currency had to be indicated.

I appreciate the contention by the plaintiff that due to the vagaries of the exchange rate the local component could not be fixed as that would have resulted in a change in the purchase price. The position taken by the defendant would have been credible and acceptable if the payment was a one off in which the price was fixed in Zimbabwe dollar terms utilising a set rate of exchange. That is not the case here. It was a term of the contract that the local component would be calculated by applying the auction rate prevailing at the time to the US dollar instalment due for payment at the time. In my view therefore the columns reflecting payment in Zimbabwe dollars are not reflective of the amount due and payable by the defendant at any given time.

 Given the contents of the two agreements I am unable to accept that the contention by the defendant that the parties agreed that payment had to be in the local currency. However, even going by the defendant’s own version as to the mode of payment, going by the schedules of payment dates and amounts due to be paid on the specified dates it is obvious that the defendant did not abide by its obligations under either agreement.

Although the defendant made tenders of payment throughout the period January 2005 to December 2006 there was no effort made to apply any of the payments to either agreement. In addition there was no effort made on the part of the defendant to relate the amount being tendered to the purchase price in US dollars. Sight was lost by the defendant that irrespective of whatever currency it chose to make its payments in, it had to marry such payment to the purchase price which was spelt out in US dollars. It was evident during the cross-examination of defendant’s witness that when the payments made by the defendant during the course of the duration of the agreement were subjected to division by the fluctuating auction rate the defendant had paid a fraction of the purchase price agreed to by the parties. There has been no evidence placed before this court by the defendant as to how much the payments made in Zimbabwe dollars amounted to in US dollars. It is not for this court to seek to calculate how much each of the payments made by the defendant at the time of payment would have amounted to in US dollars. In my view the onus to show that it had paid the purchase price or tendered payment of the balance clearly lay upon the defendant. It has not chosen to show that the payment it made was adequate or that the tender it made constituted sufficient to satisfy this court that the tender would have constituted full payment if viewed against what had already been paid.

IS THE DEFENDANT IN OCCUPATION OF THE PROPERTIES?

The defendant admits to being in occupation of one of the immovable properties and given the findings that I have come to above the plaintiff is entitled to its ejectment from the same. The other two properties were disposed of in 2008 after the matter had already been referred to trial. The evidence from the defendant is that the matter was initially set down for trial on 16 July 2007 and it failed to take off for reasons that are not pertinent to the disposal of this dispute. On 28 May 2008 the defendant’s representative deposed to and signed an affidavit in which he stated that the Deeds of Title to the three properties had been lost and that the plaintiff required their replacement. The holding deeds were to the knowledge of the defendant’s representatives being held by the plaintiff’s chosen legal practitioners as security against payment of the full purchase price by the defendant. Upon receiving copies of the holding deeds the properties were disposed of without the knowledge of the plaintiff’s directors or shareholders.

It was contended by Mr *Uriri* that this court should not prejudge the *lis* on the ownership of the two properties that were sold by the defendant’s directors. I believe that this submission ignores the fundamental fact that ownership in the properties was not transferred in accordance with the deed of sale which governed the sale of the properties in question. It matters not whether or not the defendant had paid the purchase price in full and was withholding the deeds without just cause. Such a situation would not entitle the defendant to obtain documents through subterfuge and transfer the properties to itself. The plaintiff on the evidence before me never parted with ownership in the properties.

The defendant had an *onus* to satisfy this court that its disposal of the two properties was lawful. When the properties were disposed of *litis contestatio* had already been joined and the parties had in fact been given a trial date. The witness for the defendant, who was its director and facilitated disposal of the properties admitted that he had knowledge of this fact when the properties were disposed of. The inference that one is led to make is that the disposal in the circumstances of this case was calculated to remove the properties from the ambit of the court as the lis was specifically to deal with their return to the plaintiff. I am of the view that the disposal was not only in contempt of this court but also fraudulent as it was effected to innocent third parties in return for a consideration in favour of the defendant in all probability to their potential prejudice.

It has been argued on behalf of the defendant that the plaintiff must establish ownership of the property and unauthorized occupation by the defendant. Counsel for the defendant has correctly stated the law as relates to the principle of *action rei vindication*, viz, that an owner is entitled to claim possession of his property from whomsoever is in possession thereof. In *Chetty* v *Naidoo* 1974 (3) SA 13 the incidence of ownership was framed as follows:

“… It may be difficult to define *dominium* comprehensively (cf. *Johannesburg Municipal Council* v *Rand Townships Registrar &Ors*, 1910 TS 1314 at p 1319), but there can be little doubt, (despite some reservation expressed in *Munsamy* v *Gengemma*, 1954 (4) SA 468 (N) at pp 470-471 E) that one of its incidents is the right of exclusive possession of the *res*, with the necessary corollary that the owner may claim his property wherever found, from whomsoever holding it. It is inherent in the nature of ownership that possession of the *res* should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g. a right of retention or a contractual right). The owner, in instituting a *rei vindicatio*, need, therefore, do no more than allege and prove that he is the owner and that the defendant is holding the *res,* the *onus* being on the defendant to allege and establish any right to continue to hold against the owner”.

 In my view the requirements of the *rei vindicatio* have all been met. At the time that summons was issued and served in this *lis* ownership of the properties vested in the plaintiff and therefore the averment in the summons that the plaintiff was the owner of the properties could not be challenged. In an amended plea filed by the defendant on 17 May 2007 the averment is made that the premises were occupied by the current directors of the plaintiff and further that the plaintiff could not legally seek its eviction from its own premises. That in my view constituted an admission that the plaintiff was the registered owner of the properties. Clearly on the pleadings filed on its behalf the defendant did not aver a legal or valid right to its continued retention of any of the properties. The two properties that were disposed of are *res litigiosa* and the plaintiff has submitted that the plaintiff as owner is legally entitled to vindicate its property from whomsoever may be in possession at the time of judgment. It seems to me that in *casu* the plaintiff has done just that. It has alleged that it is the owner and the evidence shows that it never divested itself of ownership in the properties. The *onus* then shifted to the defendant to establish a right to retain the property in the face of the claim by the plaintiff. The plaintiff produced to the court Deeds of Title in respect of the three immovable properties. At the time of the commencement of the proceedings the defendant was in possession of all the properties. In further pleadings filed subsequent to the summons being issued the plaintiff has alleged breach of contract on the part of the defendant leading to a cancellation of the contract and thus being the basis upon which the eviction of the defendant is sought from the properties. Although the defendant conceded that at the time of institution of the *lis* the plaintiff was the owner, it argues that the property has now been sold to parties who are not before this court. The defendant contends that its managing director became a director of the plaintiff and on that basis occupied the property. I will consider the issue of the Chisipite property first.

The defendant has accepted that it occupies this property through its managing director on the basis that he is a director of the plaintiff. In my view the defendant has assumed the *onus* to establish the right to retain possession of this property. If it is terms of a contract between the plaintiff and the defendant, it was incumbent then upon the defendant to prove the terms of the contract and that it, the defendant, has since performed its obligations in terms of the same thus justifying its retention of the property.

In so far as the two other properties are concerned the defendant has contended that they have been sold to parties who are not before me and that I should not concern myself with the *lis* in which the plaintiff seeks to claim it from third parties, as I am not seized with it. It is pertinent to note that the defendant concedes ownership of the two properties by the plaintiff at the time this *lis* was instituted. The disposal was effected after the defendant became aware of the *lis*. According to the authorities where a property is sold after the defendant has become aware of the plaintiff’s claim the property is *res litigiosa*.

What then is the effect of the property being *res litigiosa.* The authorities are divided as to when such property becomes *res litigiosa*, with some suggesting that it is due to the service of the summons upon the defendant and others opining that it is after *litis contestation*. All are agreed however, that the *rei vidicatio* is an action in *rem*. The effect of the property becoming *res litigiosa* is that the defendant cannot alienate or mortgage the property to the prejudice of the plaintiff, per Siberberg & Schoeman *The Law of Property 2nd ed*. The defendant has not disputed that the two properties disposed of are *res litigiosa*, all that the defendant argues is that the parties to whom the properties were sold are not before me and therefore I cannot determine that *lis*. If an item is *res litigiosa* a defendant in an action in *rem* may not after *litis contestio* thereafter alienate or mortgage the subject matter of the *lis*. See *ex parte Deputy Sheriff*, *Salisbury:* In *Re Doyle* v *Salgo* 1957 (3) SA 740. At p 741 G-H HATHORN J said as follows:

“The principle relied on by the claimant is recognised in *Coronel* v *Gordon Estate andGold Mining Co* 1902 T.S. 95 at p 101, and *Hall* v *Howe*, 1929 T.P.D 591 at 594. The principle is that where an action in *rem* relating to a thing is brought and *litis contestion* (i.e close of pleadings) has been reached, the defendant in the action may not thereafter alienate or mortgage the subject matter of the action which is now *res litigiosa*, to the prejudice of the plaintiff. See also*, Lee Roman* –*Dutch law* 5th ed., p 238, note 10; *Lee Commentary on Grotius’ Jurisprudence of Holland*, p 288; Voet, 44.6.3 (The Selective Voet, vol. 6, p 595)”.

Silberberg in his book the Law of Property also says that the sale of a *res litigiosa* is valid inter parties but the purchaser is bound by the judgment in the action and the successful plaintiff can recover it from the new possessor by execution and without fresh proceedings. I have not been pointed to any authority by counsel for the defence that differs from this principle. There is also no suggestion from counsel that the properties did not constitute *res litigiosa*. In the event there is no barrier to the plaintiff recovering the two properties sold to third parties through this judgment as it is a judgment in *rem* and thus binding upon the world at large.

IS THE DEFENDANT IN A POSITION TO MAKE ANY TENDER FOR PAYMENT?

The last issue to determine is whether or not it is open to the defendant to make any tender. I believe that a tender from the defendant would be available and legally justifiable if the notice to cancel had been found to be invalid. Once the notice is confirmed as being valid the cancellation is legal. Once a contract is cancelled it is no longer open for any party thereto to seek to perform an obligation under the contract. The cancellation of a contract terminates the primary obligations of the parties thereto, although secondary obligations there under (e.g. the obligation to pay damages for breach) are not necessarily also terminated. If the primary obligations have been terminated through the cancellation of the contract clearly it is not open to the defendant to make a tender of the outstanding payment of the purchase price.

COSTS CONSEQUENT TO THE DETERMINATION OF THE DISPUTE

The plaintiff has prayed for costs on a punitive scale against the defendant. The defendant has been assisted by a single firm of legal practitioners from the time that it encountered difficulties in paying for the assets it acquired under the two agreements. Certainly by May 2006 the defendant was being afforded legal advice by a legal practitioner. In my view, the Deed of Sale, in respect of which the immovable properties were disposed of, contained clear and unambiguous provisions on the parties’ rights and obligations under the same. Transfer in the properties would only pass upon full payment of the purchase price of US$481 000-00. To the knowledge of the defendant’s legal practitioners, the plaintiff was firmly of the view that the purchase price had not been paid as required under the agreements and that to this end the plaintiff had cancelled the Deed of Sale and instituted proceedings for the eviction of the defendant from those same premises. Despite this knowledge the defendant was able through the assistance of the law firm in question to obtain replacement Deeds of Title through which it was able to sell and transfer two of the properties in dispute to what it terms innocent third parties.

In addition to this, the defendant through the assistance of Mr *Chinawa* was able to file an urgent chamber application in which averments made in the founding affidavit were at odds with the evidence adduced at the trial in this matter and most importantly with the documents that were in the possession of the defendant’s legal practitioner. The deponent to that affidavit perjured himself.

A legal practitioner has a duty to advance the case of his client. He should not, in doing so cause or assist his client in committing an offence or in that enterprise abandon his duty to the court. In this case, the legal practitioner acting for the defendant abandoned his duty to the court. The evidence does not suggest that he facilitated the acquisition by the defendant of replacement deeds for purposes of transfer. That process was facilitated by someone within the law firm in which he is a senior partner. Subsequent to this, he became aware of the manner in which his client had conducted the process. He should at that stage have indicated to his client the illegality of the manner of acquiring the deeds. He did not. He proceeded further to assist his client in the preparation of an affidavit in which his client made statements that were not borne out by the facts as known by himself and his client. The affidavit was utilised in an application in which the plaintiff’s shareholders were not cited and resulted in tenants who had been given possession by those shareholders being evicted by an order of court. That is conduct that cannot be condoned by this court. In my view the legal practitioners deserves censure from this court. But for his conduct, this matter might not have gone as far as it did. I am of the view that he and his client should pay the costs of this trial.

I will consequently issue an order in the following terms:

IT IS ORDERED THAT:

1. The defendant and all those claiming occupation through it be and are hereby ordered to vacate the plaintiff’s premises namely; 8 Whites Way, Msasa; 8 Loreley Close Msasa; and 8 Comet Close Mt Pleasant Harare, respectively, within ten (10) days of the date of service of this order failing which the Sheriff for Harare or his lawful Deputy be and is hereby authorised to evict them from the said premises.
2. The defendant and its legal practitioner Mr *D Chinawa* be and are hereby ordered to pay the plaintiff’s costs of suit on a scale as between legal practitioner and client.

*Wintertons*, legal practitioners for the plaintiff

*Kantor &Immernam*, legal practitioners for the defendant

1. See Rautenbach v Venner 1928 T.P.D 26 [↑](#footnote-ref-1)